

International Law Studies—Volume 50

THE LAW OF WAR AND NEUTRALITY AT SEA

Robert W. Tucker (Author)

The thoughts and opinions expressed are those of the authors and not necessarily of the U.S.

Government, the U.S. Department of the Navy or the Naval War College.

## CHAPTER 5

### VESSELS, AIRCRAFT, AND PERSONNEL AT SEA

#### 500 VESSELS AND AIRCRAFT

This chapter describes the legal status or character of vessels, aircraft, and personnel in warfare at sea, and the action permitted against them under international law.

a. **VESSELS AND AIRCRAFT.**<sup>2</sup> The term "vessels and aircraft" as used herein includes all objects which are or may be used as a means of transportation by states on or under the sea or in the air above the sea and land.

b. **MERCHANT VESSELS AND AIRCRAFT.** The term "merchant vessels and aircraft" refers to all vessels and aircraft, whether privately or publicly owned or controlled, which are not in the warship or military aircraft category,<sup>3</sup> and which are solely engaged in ordinary commercial activities.<sup>4</sup>

c. **WARSHIPS.** The term "warships" includes all vessels commissioned as a part of the naval forces of a state and authorized to display the appropriate flag or pennant as evidence thereof. Such vessels must in addition be commanded by a member of the military forces of a state and must be manned by a crew subject to military discipline.

d. **MILITARY AIRCRAFT.** The term "military aircraft" includes all aircraft operated by commissioned units of the naval forces of a state and includes military aircraft operated by commissioned units or other component parts of the armed forces which are engaged in operations at sea. Such aircraft must bear the military markings of their state, must be commanded by a member of the military forces, and must be manned by a crew subject to military discipline.

e. **BELLIGERENT RIGHTS.** At sea, only warships and military aircraft may exercise belligerent rights.

#### 501 ENEMY CHARACTER

All vessels operating under an enemy flag and all aircraft bearing enemy markings possess enemy character. However, the fact that a merchant vessel flies a neutral flag or that an aircraft bears neutral marking does not necessarily establish neutral character. Any merchant vessel or aircraft owned or controlled by or for an enemy state, enemy persons, or any enemy corporation possesses enemy character, regardless of whether or not such a vessel or aircraft operates under a neutral flag or bears neutral markings.<sup>5</sup>

a. Neutral merchant vessels and aircraft acquire enemy character<sup>6</sup> and

(Footnotes at end of chapter)

are liable to the same treatment as *enemy warships and military aircraft* (see paragraph 503a) when engaging in the following acts:

1. Taking a direct part in the hostilities on the side of an enemy;
2. Acting in any capacity as a naval or military auxiliary to an enemy's armed forces.

b. Neutral merchant vessels and aircraft acquire enemy character and are liable to the same treatment as *enemy merchant vessels and aircraft* (see paragraph 503b) when engaging in the following acts:

1. Operating directly under enemy control, orders, charter, employment, or direction;
2. Resisting an attempt to establish identity, including visit and search.<sup>7</sup>

## 502 VISIT AND SEARCH

a. OCCASIONS FOR EXERCISE. The belligerent right of visit and search may be exercised anywhere outside of neutral jurisdiction upon all merchant vessels and aircraft<sup>8</sup> in order to determine their character (enemy or neutral), the nature of their cargo, the manner of their employment, or other facts which bear on their relation to the war. Historically, visit and search was considered the only legally acceptable method for determining whether or not a merchant vessel was subject to capture. It is now recognized that changes in warfare have rendered this method either hazardous or impracticable in many situations. In the case of enemy merchant vessels and aircraft and neutral merchant vessels and aircraft acquiring enemy character as described in the preceding article, the belligerent right of capture (and, exceptionally, destruction as described in paragraph 503b) need not be preceded by visit and search, provided that a positive determination of status can be obtained by other methods.<sup>9</sup> Whether or not the right of visit and search may be exercised upon neutral merchant vessels under convoy of neutral warships of the same nationality remains an unsettled matter in state practice.<sup>10</sup>

b. METHODS OF VISIT AND SEARCH OF MERCHANT VESSELS.<sup>11</sup> In the absence of special instructions<sup>12</sup> issued during a period of armed conflict, the following procedure should be carried out:

1. In general, the belligerent right of visit and search should be exercised with all possible tact and consideration.

2. Before summoning a vessel to lie to, a warship must hoist her own national flag. The summons should be made by firing a blank charge, by international flag signal, or by other recognized means. The summoned vessel if a neutral, is bound to stop, lie to, and display her colors; if an enemy vessel, she is not so bound and legally may even resist by force, but she thereby assumes all risks of resulting damage.<sup>13</sup>

3. If a summoned vessel takes to flight, she may be pursued and brought to, by forcible measures if necessary.

4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable a second officer should accompany the officer charged with the examination. The arming of the officers and the boat's crew is left to the discretion of the commanding officer of the visiting vessel.

5. If visit and search at sea of a neutral merchant vessel is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning vessel or by another vessel or by aircraft to the nearest place where search may be made conveniently.<sup>14</sup> In this case the neutral vessel should not be required to lower her flag, since she has not been captured, but she must proceed according to orders of the escorting vessel or aircraft.<sup>15</sup> A neutral vessel disobeying a belligerent's orders may be captured and sent in for adjudication.

6. A boarding officer should first examine a ship's papers in order to determine her character, ports of departure and destination, nature of cargo and employment, and other facts deemed essential. The papers which are generally found on board a merchant vessel are:

- (a) Certificate of registry of nationality
- (b) Crew list
- (c) Passenger list
- (d) Log book
- (e) Bill of health
- (f) Clearance
- (g) Charter party, if chartered
- (h) Invoices or manifests of cargo
- (i) Bills of lading
- (j) A consular declaration certifying the innocence of the cargo may be included.

7. The evidence furnished by papers against a vessel may be taken as conclusive. However, regularity of papers and evidence of innocence of cargo or destination furnished by them are not necessarily conclusive, and if any doubt exists the personnel of the vessel should be questioned and a search made—if practicable—of the ship or cargo. There are many circumstances which may raise legitimate doubt or suspicion. For example, if a vessel has deviated far from her direct course, this, if not satisfactorily explained, is a suspicious circumstance warranting search, however favorable the character of the papers. If search, under suspicious circumstances, does not satisfy a boarding officer of the innocence of a vessel, the vessel should be captured and sent in for adjudication. Even though a prize court may later order the release of the vessel, the commander sending the vessel in for adjudication acted properly if the result of visit and search appeared to furnish probable cause for capture.

8. When sending in a captured vessel as prize, the detailed prize pro-

cedures contained in *Instructions for Prize Masters and Special Prize Commissioners* (NAVEXOS P-825) are to be followed.<sup>16</sup>

9. Unless military security prohibits, the boarding officer must record the facts concerning the visit and search in the log book of the vessel visited, including the date when and the position where the visit occurred. The entry in the log book should be authenticated by the signature and rank of the boarding officer. Neither the name of the visiting vessel nor the name and rank of her commanding officer should be disclosed.

## 503 CAPTURE AND DESTRUCTION<sup>17</sup>

### a. ENEMY WARSHIPS AND MILITARY AIRCRAFT

(1) *Destruction*. Enemy warships and military aircraft (including naval and military auxiliaries) may be attacked and destroyed outside neutral jurisdiction.<sup>18</sup>

(2) *Capture*. Enemy warships and military aircraft may be captured outside neutral jurisdiction. Prize procedure is not used for such captured vessels and aircraft because their ownership immediately vests in the captor's government by the fact of capture.

### b. ENEMY MERCHANT VESSELS AND AIRCRAFT

(1) *Capture*. Enemy merchant vessels and aircraft may be captured outside neutral jurisdiction.

(2) *Destruction of Enemy Prizes*. Enemy merchant vessels and aircraft which have been captured may, in case of military necessity, be destroyed by the capturing officer when they cannot be sent or escorted in for adjudication.<sup>19</sup> Should the necessity for the destruction of an enemy prize arise, it is the duty of the capturing officer to take all possible measures to provide for the safety of passengers and crew.<sup>20</sup> All documents and papers relating to an enemy prize should be saved.<sup>21</sup> If practicable, the personal effects of passengers should be saved. Every case of destruction of an enemy prize should be reported promptly to higher command.

(3) *Destruction of Enemy Merchant Vessels Prior to Capture*.<sup>22</sup> Enemy merchant vessels may be attacked and destroyed, either with or without prior warning, in any of the following circumstances:

1. Actively resisting visit and search or capture.
2. Refusing to stop upon being duly summoned.
3. Sailing under convoy of enemy warships or enemy military aircraft.
4. If armed, and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy.
5. If incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces.
6. If acting in any capacity as a naval or military auxiliary to an enemy's armed forces.

c. ENEMY VESSELS AND AIRCRAFT EXEMPT FROM DESTRUCTION OR CAPTURE. The following enemy vessels and aircraft, when innocently employed, are exempt from destruction or capture:

1. Cartel vessels and aircraft, i. e. vessels and aircraft designated for and engaged in the exchange of prisoners.
2. Properly designated hospital ships, medical transports, and medical aircraft.<sup>23</sup>
3. Vessels charged with religious, scientific, or philanthropic missions.<sup>24</sup>
4. Vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents.
5. Vessels and aircraft exempt by proclamation, operation plan, order, or other directive.
6. Small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade and not taking part in hostilities. Such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area.<sup>25</sup>

d. NEUTRAL MERCHANT VESSELS AND AIRCRAFT are in general liable to capture if performing any of the following acts.

1. Carrying contraband (see paragraph 631d).
2. Breaking, or attempting to break, blockade (see paragraph 632g).
3. Carrying personnel in the military or public service of an enemy.<sup>26</sup>
4. Transmitting information in the interest of an enemy.
5. Avoiding an attempt to establish identity, including visit and search.
6. Presenting irregular or fraudulent papers; lacking necessary papers; destroying, defacing, or concealing papers.
7. Violating regulations established by a belligerent within the immediate area of naval operations (see paragraph 43ob).

When sending in captured neutral merchant vessels or aircraft as prize, the detailed prize procedures contained in *Instructions for Prize Masters and Special Prize Commissioners* (NAVEXOS P-825) should be followed.

e. DESTRUCTION OF NEUTRAL PRIZES. Although the destruction of a neutral prize is not absolutely forbidden, it involves a much more serious responsibility than the destruction of an enemy prize.<sup>27</sup> A capturing officer, therefore, should never order such destruction without being entirely satisfied that the military reasons therefor justify it; i. e. under circumstances such that a prize can neither be sent in nor, in his opinion, properly be released.<sup>28</sup>

Should the necessity for the destruction of a neutral prize arise, it is the duty of the capturing officer to provide for the safety of the passengers and crew.<sup>29</sup> All documents and papers relating to a neutral prize should be saved.<sup>30</sup> If practicable, the personal effects of passengers should be saved.

Every case of destruction of neutral prize should be reported promptly to higher command.

#### 510 PERSONNEL

The following articles define the legal status of personnel and set forth the action permitted against them under international law.

#### 511 ENEMY WARSHIPS AND MILITARY AIRCRAFT

a. CAPTURED ENEMY PERSONNEL. The officers and crews of captured or destroyed enemy warships and military aircraft (including naval and military auxiliaries) should be made prisoners of war.<sup>31</sup> Persons authorized by a belligerent to accompany his armed forces, though without actually being members thereof, also should be made prisoners of war.<sup>32</sup> Religious, medical, and hospital personnel taken from enemy warships and military aircraft should not be considered prisoners of war, although they may be retained by the belligerent commander, under whose authority they are, to minister to the needs of prisoners of war.<sup>33</sup>

b. ENEMY WOUNDED AND DEAD. As far as military interests permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick; to protect them against pillage and ill-treatment; to ensure their adequate care; and to search for the dead and prevent their being despoiled.<sup>34</sup>

c. QUARTER. It is forbidden to refuse quarter to any enemy who has surrendered in good faith.<sup>35</sup> In particular, it is forbidden either to continue to attack enemy warships and military aircraft, which have clearly indicated a readiness to surrender<sup>36</sup> or to fire upon the survivors of such vessels and aircraft who no longer have the means to defend themselves.<sup>37</sup>

#### 512 ENEMY MERCHANT VESSELS AND AIRCRAFT

The officers and crews of captured enemy merchant vessels and aircraft may be made prisoners of war.<sup>38</sup> Other enemy nationals on board captured enemy merchant vessels and aircraft as private passengers are subject to the discipline of a captor.<sup>39</sup> The officers and crew who are nationals of a neutral state normally are not made prisoners of war.<sup>40</sup> However, if they participate in any acts of resistance against a captor, they may be treated as prisoners of war. The nationals of a neutral state on board captured enemy merchant vessels and aircraft as private passengers should not be made prisoners of war.

If for any reason (see subparagraph 503b3) an enemy merchant vessel or aircraft is rendered liable to attack, either with or without prior warning, the belligerent obligations defined in paragraphs 511b and c apply.

#### 513 NEUTRAL MERCHANT VESSELS AND AIRCRAFT

a. OFFICERS AND CREWS. The officers and crews of captured neutral merchant vessels and aircraft, who are nationals of a neutral state, should not be made prisoners of war.<sup>41</sup>

b. **ENEMY NATIONALS.** Enemy nationals found on board neutral merchant vessels and aircraft as passengers who are actually embodied in the military forces of an enemy, or who are en route to serve in an enemy's military forces, or who are employed in the public service of an enemy, or who may be engaged in or suspected of service in the interests of an enemy may be made prisoners of war.<sup>42</sup>

## 520 COMMUNICATIONS

a. **COMMUNICATIONS BY NEUTRAL MERCHANT VESSELS AND AIRCRAFT.** A neutral merchant vessel or aircraft which, when on or over the high seas, transmits information destined for a belligerent concerning military operations or military forces is liable to capture.

Within the immediate vicinity of his forces, a belligerent commanding officer may exercise control over the communications of any neutral merchant vessel or aircraft whose presence might otherwise endanger the success of his operations. Legitimate distress communications by neutral vessels and aircraft should be permitted if they do not prejudice the success of such operations. A neutral vessel or aircraft which does not conform to a belligerent's control exposes itself to the risk of being fired upon and renders itself liable to capture.

b. **SUBMARINE TELEGRAPH CABLES.** Submarine telegraph cables between points in an enemy's territory, between points in the territories of enemies, between points in the territory of an enemy and neutral territory, or between points in occupied territory and neutral territory are subject to such treatment as the necessities of war may require. Submarine telegraph cables between two neutral territories should be held inviolable and free from interference.

## NOTES FOR CHAPTER 5

<sup>2</sup> Although aircraft are included with vessels here, it must be made clear that there are certain differences between the established rules of naval warfare dealing with the treatment of vessels and the practices (whose legal character remains uncertain in many respects) that have developed with respect to the treatment of aircraft. The primary concern of Section 500 is with the treatment of vessels during warfare at sea. However, both in the text of Section 500 and in the notes to this section, attention will be directed to the similarities in, as well as the differences between, the treatment of vessels and the treatment of aircraft.

<sup>3</sup> The term "merchant vessels and aircraft" therefore includes state-owned vessels and aircraft engaged in carrying persons or goods for commercial purposes.

<sup>4</sup> There is some difficulty involved in determining the precise status of state-owned vessels whose purposes are other than commercial in nature (e. g., customs and police vessels) but which do not belong to the armed forces of a state. It is clear, however, that such public vessels are not competent to exercise belligerent rights at sea.

<sup>5</sup> A neutral state may grant a merchant vessel or aircraft the right to operate under its flag, even though the vessel or aircraft remains substantially owned or controlled by enemy interests. According to the international law of prize, such a vessel or aircraft nevertheless possesses enemy character, and may be treated as enemy by the concerned belligerent.

There is no settled practice among states regarding the conditions under which the transfer of enemy merchant vessels (and, presumably, aircraft) to a neutral flag legitimately may be



made. Despite agreement that such transfers will not be recognized when fraudulently made for the purpose of evading belligerent capture, states differ in the specific conditions that they require to be met before such transfers can be considered as *bona fide*. However, it is generally recognized that, at the very least, all such transfers must result in the complete divestiture of enemy ownership and control. The problem of transfer is mainly the proper concern of prize courts rather than of an operating naval commander, and the latter is entitled to seize any vessel transferred from an enemy to a neutral flag when such transfer has been made either immediately prior to, or during, hostilities.

<sup>6</sup> With the exception of resistance to visit and search, the acts defined here (and in examples 3 and 4 of paragraph 503d) have been traditionally considered under the heading of "unneutral service." Although originally established for and applied to the conduct of neutral vessels, the rules regarding unneutral service have been considered generally applicable to neutral aircraft as well.

The term "unneutral service" does not refer to acts performed by, and attributable to, a neutral state; that is to say, acts, the performance of which would, if performed by a neutral state, constitute a violation of the neutral state's obligations. It does refer to certain acts which are forbidden to neutral vessels and aircraft (other than neutral warships and neutral military aircraft). Attempts to define the essential characteristics common to acts constituting unneutral service have not been very satisfactory. However, it is clear that the types of unneutral service a neutral merchant vessel or aircraft may perform are varied; hence, the specific penalties applicable for acts of unneutral service may vary. The services enumerated in paragraph 501a are of such a nature as to identify a neutral vessel or aircraft with the armed forces of the belligerent for whom these acts are performed, and, for this reason, such vessels or aircraft may be treated in the same manner as enemy warships or military aircraft. The services defined in paragraph 501b also identify neutral merchant vessels and aircraft performing them with the belligerent, but not with the belligerent's armed forces. Such vessels and aircraft are assimilated to the position of, and may be treated in the same manner as, enemy merchant vessels and aircraft. The acts of unneutral service cited in paragraph 503d (examples 3 and 4) imply neither a direct belligerent control over, nor a close belligerent relation with, neutral merchant vessels and aircraft. By custom, vessels performing these acts, though not acquiring enemy character, are liable to capture.

<sup>7</sup> There are a number of ways by which neutral merchant vessels may attempt to frustrate a belligerent in the lawful exercise of belligerent rights, particularly the belligerent right of visit and search. Resistance to visit and search is the most serious act of this group, and its performance by neutral merchant vessels results in enemy character. Other ways, less serious, which result in liability to capture when performed by neutral merchant vessels, are given in paragraph 503d (examples 5 and 6).

<sup>8</sup> There are no reported instances of visit and search *of aircraft by aircraft*. Although the right of visit and search of aircraft by aircraft is unquestioned, there are no established practices indicating the manner in which this belligerent right may be exercised. Under ordinary circumstances the visit and search of aircraft will prove feasible only by ordering aircraft to proceed under escort to the nearest convenient belligerent landing area. Paragraph 502b of the text is restricted to a consideration of the belligerent right of visit and search of *merchant vessels*. The problem of visit and search *of aircraft by aircraft* should not be confused with the quite different problem of visit and search *of merchant vessels by aircraft* (see subparagraph 502b(5) and Notes 14 and 15 below).

<sup>9</sup> The possible dangers attendant upon the attempt to visit and search enemy merchant vessels are readily apparent. Since enemy vessels, with the exception of those enemy vessels enumerated in paragraph 503c, are always liable to capture, the prior exercise of visit and search is not considered mandatory, *provided* that a positive determination of enemy status can be made by other methods. Similar considerations apply to neutral merchant vessels acquiring enemy character, though here even greater caution be exercised.

<sup>10</sup> There is no common agreement, hence there are no settled rules, among states on this

point. While some states have denied the right of belligerent warships to visit and search neutral merchant vessels under convoy of neutral warships of their own nationality other states have insisted that a belligerent does possess such a right. In the past, the United States has adhered to the former position and the earlier *1941 Instructions Governing Maritime and Aerial Warfare* (paragraphs 57, 58 and 59) contained the following provisions:

“Neutral vessels under convoy of vessels of war of their own nationality are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent ship of war, all information as to the character of the vessels and of their cargoes which could be obtained by visit and search.

If the commander of the United States vessel has reason to suspect that the commander of the convoy has been deceived regarding the innocent character of any of the vessels (and their cargoes or voyages) under his convoy shall impart his suspicions to the latter. In such a case it is to be expected that the commander of the convoy will undertake an examination to establish the facts. The commander of the convoy alone can conduct this investigation, the officers of the United States visiting vessel can take no part therein.

The commander of the convoy may be expected to report the result of his investigation to the commander of the United States vessel. Should that result confirm the latter's suspicions, the former may further be expected to withdraw his protection from the suspected vessel; whereupon she shall be made a prize by the commander of the United States vessel.”

The above-quoted provisions should serve as a guide for operating naval commanders in those situations in which commanders are without, and are unable to obtain, instructions from higher command. It should be emphasized that neutral merchant vessels under convoy of enemy warships acquire enemy character and are always liable to capture.

<sup>11</sup> See Note 8 above.

<sup>12</sup> The practice of issuing Navicerts resorted to by Great Britain in World Wars I and II and similar procedures are typical of such “special instructions.” For the general consideration relating to Navicerts see Chapter 6, Note 23.

<sup>13</sup> On the other hand, a neutral merchant vessel is obligated not to resist the belligerent right of visit and search.

<sup>14</sup> The consistent practice of belligerents in World Wars I and II has firmly established the belligerent right of search in port. As to belligerent deviation of neutral merchant vessels before either visit or search, the following comment is instructive:

“If deviation for search be conceded, there can in principle be no objection in proper cases to allowing the diversion to take place before visit, that is to say, without insisting upon a formal boarding of the suspected vessel. The purpose of visit is to ascertain whether there are any grounds for search and detention. Under modern conditions it will often happen that the evidence justifying detention is already in the hands of the belligerent government, having been obtained by . . . intelligence methods. If that be so, nothing that is likely to be found in the ship's papers will add to the available evidence, and the boarding in such case becomes an idle formality.” H. A. Smith, *The Law and Custom of the Sea* (2nd ed., 1950), p. 168.

The question of deviation without prior visit or search is of particular relevance in the case of belligerent military aircraft. Although there is no question of the right of belligerent military aircraft to visit and search vessels at sea, it is apparent that this right can be exercised only infrequently. In those circumstances in which visit and search is impracticable (and particularly when information concerning a vessel is already held that, if verified by search, would justify her capture), a belligerent military aircraft may order a vessel to proceed under escort as directed.

<sup>15</sup> In its essential features, the practice of deviation (diversion) is merely a prolongation of the act of visit and search. A diverted vessel, while proceeding to port or any other convenient place, is under detention by a belligerent in the same sense as a vessel being visited and searched at sea. Hence, while vessels under diversion are subject to the control of escorting vessels or aircraft, they are not considered, or treated, as prizes.

<sup>16</sup> NAVEXOS P-825 (JAG) records the World War II amendments to the United States Prize Statutes and to the Federal District Court Rules relating to prize adjudication. Pages 1 through 10, and Forms 1 through 4 of that publication are of particular importance to commanding officers. The United States' statutes on prize, which apply to *captured vessels and aircraft*, are found in Title 34 of the United States Code, Chapter 20, Sections 1131-1167 (the applicable portions of which are quoted below).

Under ordinary circumstances, prizes should be sent promptly to a port within the jurisdiction of the United States for adjudication. In general, a prize master with a crew should be sent on board the prize for this purpose. If for any reason this is impracticable, a prize may be escorted into port by the capturing vessel, or by another vessel of war of the United States or a co-belligerent. The prize must obey the instructions of the escorting vessel, under pain of forcible measures.

The applicable provisions of the United States Code are as follows:

"The commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log book, with all other documents, letters and other papers found on board, and make an inventory of the same and seal them up and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found and are in the condition in which they were found; or explaining the absence of any documents or papers or any change in their condition. He shall also send to such court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient, in view of the interests of probable claimants. If the captured vessel, or any part of the captured property is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisal made by persons as competent and impartial as can be obtained, and their report shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the Government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the Treasurer of the United States or public depository most accessible to such court and subject to its order in the cause." (34 U. S. C. 1133)

"The prize master shall make his way diligently to the selected port and there immediately deliver to a prize commissioner the documents and papers, and the inventory thereof, and make affidavit that they are the same and are in the same condition as delivered to him, or explaining any absence or change of conditions therein, and that the prize property is in the same condition as delivered to him, or explaining any loss or damage thereto; and he shall further report to the district attorney and give to him all the information in his possession respecting the prize and her capture; and he shall deliver over the persons sent as witnesses to the custody of the marshal and shall retain the prize in his custody until it shall be taken therefrom by process of the prize court." (34 U. S. C. 1134)

If circumstances permit, it is preferable that the officer making the search should act as prize master. Section 1140, Title 34, of the United States Code defines the procedure to be followed when converting a prize, whether enemy or neutral, to public use. The code requires that, prior to any such conversion

". . . it (any captured vessel . . .) shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisal, and inventory shall be sent to the court in which proceedings are to be had . . ." (34 U. S. C. 1140)

While any prize thus may be legally converted to immediate public use, and would be under compelling circumstances, it is inadvisable so to convert neutral property captured as prize,

because indemnification will follow if the prize court fails to condemn the property. (See Note 19 below.)

<sup>17</sup> See Note 22 below.

<sup>18</sup> The prohibition against committing acts of hostility within neutral jurisdiction is subject to the provisions of Article 441.

<sup>19</sup> As against an enemy, title to captured enemy merchant vessels or aircraft vests in the captor's government by virtue of the fact of capture. However, claims may be made by neutrals, either with respect to the captured vessel or aircraft or with respect to the cargo (normally, non-contraband neutral cargo on board a captured enemy vessel is not liable to confiscation). For these reasons, it is always preferable that captured enemy prizes be sent in for adjudication, whenever possible.

<sup>20</sup> See Note 22 below.

<sup>21</sup> All the documents and papers of a prize, as required by United States Code, Title 34, Section 1133 (see Note 16 above), should be taken on board the capturing vessel of war and should be inventoried and sealed, in accordance with the procedure set forth in that section, for delivery to the prize court, with especial view to the protection of the interests of the owners of innocent neutral cargo on board, if such exists. A list of such documents and papers is furnished in subparagraph 502b (6).

<sup>22</sup> According to the customary and conventional law of naval warfare valid prior to World War II, a belligerent warship or military aircraft was forbidden to destroy an enemy merchant vessel or render her incapable of navigation without having first provided for the safety of passengers and crew; exception being made in the circumstances of persistent refusal to stop on being duly summoned or of active resistance to visit and search (or capture). Thus, Article 22 of the London Naval Treaty of 1930 stated:

“(1) In their action with regard to merchant ships, submarines must conform to the rule of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew, and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.”

Article 22 of the 1930 London Naval Treaty was incorporated *verbatim* into the London Protocol of 1936, to which almost all of the major belligerents of World War II expressly acceded. These rules, deemed declaratory of customary international law, have been interpreted as applicable to belligerent military aircraft in their action toward enemy merchant vessels. (On the other hand, it is difficult to estimate the extent to which the obligations embodied in the London Protocol of 1936 have been considered by belligerents as applicable, by analogy, to the treatment of nonmilitary enemy aircraft. The little experience to be gained in this respect from the practices of belligerents during World War II is not very instructive. At best, enemy nonmilitary aircraft received no better treatment than enemy merchant vessels. However, it may be stated that in addition to the difficulties of proper identification, the manifest difficulties of successfully exercising either visit and search or any similar type of effective control over aircraft forbid any easy application by analogy of the rules governing the treatment of merchant vessels to aircraft. Hence, in the absence of any clearly established practice to the contrary, it may be assumed that the obligations laid down in the London Protocol of 1936 have not been considered mandatory in the case of enemy aircraft.)

During World Wars I and II the belligerent practice of attacking and sinking enemy merchant vessels without warning (or only with the most peremptory warning), and without having first provided for the safety of passengers and crew, was widespread. It is true that in the early period of World War II, as in World War I, the belligerent claim to sink enemy merchant ves-

sels, without warning and in violation of the obligations laid down in the London Protocol of 1936, was generally justified as a reprisal against illegal acts of an enemy.

In its judgment on Admiral Doenitz, the International Military Tribunal at Nuremberg acquitted the accused of the charge of waging unrestricted submarine warfare (i. e., sinking without warning) against British merchant vessels, for the following reasons:

“Shortly after the outbreak of war the British Admiralty . . . armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning network of naval intelligence. On 1 October 1939, the British Admiralty announced that British merchant ships had been ordered to ram U-boats if possible.” *U. S. Naval War College, International Law Documents, 1946-47 (1948)*, p. 299.

<sup>23</sup> Article 22 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea states:

“Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.”

The proper marking for military hospital ships is described in Article 43 of this Convention. Further provisions of the Convention provide that enemy hospital ships must not “hamper the movement of the combatants” and that “during and after an engagement, they will act at their own risk” (Article 30). In order to insure that hospital ships are innocently employed, belligerents:

“. . . shall have the right to control and search the vessels . . . They (belligerents) can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so require.” (Article 31.)

Article 14 of this Convention gives to belligerents the right to demand that the wounded, sick and shipwrecked on board military hospital ships be surrendered “provided that the wounded and sick are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment.”

On the whole, these provisions may be considered as declaratory of established rules of customary international law. On the other hand, the provisions of the same 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea on the subject of medical transports and medical aircraft are new, and go far toward resolving problems that the practices of belligerents hitherto had left unsettled. Article 38 states:

“Ships chartered for that purpose shall be authorized to transport equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease, provided that the particulars regarding their voyage have been notified to the adverse Power and approved by the latter. The adverse Power shall preserve the right to board the carrier ships, but not to capture them or seize the equipment carried.”

Article 39 states:

“Medical aircraft, that is to say, aircraft exclusively employed for the removal of the wounded, sick and shipwrecked, and for the transport of medical personnel and equipment, may not be the object of attack, but shall be respected by the Parties to the conflict, while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned.

They shall be clearly marked with the distinctive emblem prescribed in Article 41, together with their national colors, on their lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification which may be agreed upon between the Parties to the conflict upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to alight on land or water. In the event of having thus to alight, the aircraft with its occupants may continue its flight after examination, if any.

In the event of alighting involuntarily on land or water in enemy-occupied territory, the wounded, sick and shipwrecked, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Articles 36 and 37."

<sup>24</sup> Article 4 of Hague Convention No. XI (1907) states:

"Vessels charged with religious, scientific, or philanthropic missions are . . . exempt from capture."

<sup>25</sup> Article 3 of Hague Convention No. XI (1907) states:

"Boats used exclusively in the coast fishery or in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.

They cease to be exempt as soon as they take any part whatever in hostilities.

The Contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

It is necessary to emphasize that the immunity of small coastal fishing vessels and small boats depends entirely upon their "innocent employment". If found to be assisting a belligerent in any manner whatever (e. g., if incorporated within a belligerent's naval intelligence network) they may be captured or destroyed. Refusal to provide immediate identification upon demand is sufficient basis for the capture or destruction of such vessels and boats. See also Note 20 above and subparagraphs 632g (3) and (4).

<sup>26</sup> Normally, a neutral merchant vessel is not considered liable to capture for the acts enumerated in examples 3 and 4 of paragraph 503d if, when encountered at sea, she is unaware of the opening of hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark those passengers who are in the military or public service of a belligerent. A vessel is deemed to know of the state of war if she left an enemy port after the opening of hostilities, or a neutral port after a notification of the opening of hostilities had been made in sufficient time to the Power to which the port belonged. However, it should be apparent that actual knowledge is often difficult or impossible to establish. Because of the existence of modern means of communication, a presumption of knowledge may be applied in all doubtful cases. The final determination of this question properly can be left to the prize court.

<sup>27</sup> By the fact of capture the title to a neutral merchant vessel or aircraft is held in trust by the government of the captor pending adjudication by a prize court. Innocent neutral cargo on board does not change title by reason of the capture. See also Article 633.

<sup>28</sup> It should be observed that paragraph 503e refers to the destruction of neutral merchant vessels whose capture for any of the acts enumerated in paragraph 503d has already been effected. Paragraph 503e does not refer to neutral merchant vessels merely under detention and directed into port for visit and search.

<sup>29</sup> See Note 22 above. The obligations laid down in the London Protocol of 1936, insofar as they apply to neutral merchant vessels and aircraft, remain valid; exception being made only for those neutral merchant vessels and aircraft performing any of the acts enumerated in paragraphs 501a and b, and paragraph 430b. In its judgment on Admiral Doenitz, the International Military Tribunal at Nuremberg found the accused guilty of violating the London Protocol of 1936 by proclaiming "operational zones" and sinking neutral merchant vessels entering these zones.

". . . the protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones, was, therefore, in the opinion of the Tribunal, a violation of the protocol." *U. S. Naval War College, International Law Documents, 1946-1947* (1948), p. 300.

<sup>30</sup> See Note 16 above.

<sup>31</sup> The personnel of neutral merchant vessels and aircraft engaged in any of the acts enumerated in paragraph 501a also should be treated, when captured, as prisoners of war. *U. S. Navy Regulations* (1948), Article 0707, Prisoners of War, reads:

“On taking or receiving prisoners of war, the commanding officer shall assure that such prisoners are treated with humanity; that their personal property is preserved and protected; that they are allowed the use of such of their effects as may be necessary for their health; that they are supplied with proper rations; that they are properly guarded and deprived of all means of escape and revolt. . . .”

Detailed provisions concerning the treatment to be accorded prisoners of war are contained in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.

<sup>32</sup> Article 4, paragraph A (4) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War states that the following persons are entitled to treatment as prisoners of war:

“Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card. . . .”

<sup>33</sup> Religious, medical and hospital personnel so retained are subject to the discipline imposed by the captor. The provisions of the 1949 Geneva Conventions governing the treatment of such personnel falling into the hands of the enemy are: Article 37 of the Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Articles 28, 29, 30 and 31 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; and Article 33 of the Convention Relative to the Treatment of Prisoners of War.

<sup>34</sup> The obligations defined in paragraph 511b may be considered as part of customary law. (See, in addition, Article 16 of Hague Convention No. X, 1907, and Article 18 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.)

<sup>35</sup> Article 23 paragraphs c and d of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV (1907), which are equally applicable to naval warfare, state that:

“. . . it is especially forbidden— . . . c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion; d. To declare that no quarter will be given; . . .”

However, quarter can be refused when those who ask for it subsequently attempt to destroy those who have granted it.

<sup>36</sup> “As soon as an attacked or counter-attacked vessel hauls down her flag and, therefore, signals that she is ready to surrender, she must be given quarter and seized without further firing. To continue an attack although she is ready to surrender, and to sink the vessel and her crew, would constitute a violation of customary International Law, and would only, as an exception, be admissible in case of imperative necessity or of reprisals.” Oppenheim-Lauterpacht, *International Law*, Vol. II (7th ed., 1952), p. 471.

In the trial of Helmuth Von Ruchteschell before a British Military Court, one of the war crimes charged to the accused was that he continued to fire upon enemy merchant vessels after the latter had indicated surrender. In the notes on the trial, the following comment occurs concerning surrender at sea:

“The entire question . . . was: are there generally recognized ways of indicating surrender at sea other than hauling down a ship’s flag? Two expert witnesses (a captain in the Royal Navy and a former vice-admiral in the German Navy) gave evidence, *inter alia*, on the customs in this regard of their respective services. The common denominator of their evidence could be thus stated: (1) the attacked ship must stop her engines; (2) if the attacker signals, the signal must be answered—if the wireless is out of action, it must be answered by a sig-

nalling pennant by day or by torch or flashlight by night; (3) the guns must not be manned, the crew should be amidships and taking to the lifeboats; (4) the white flag may be hoisted by day and by night, all the ship's lights should be put on." *Trial of Helmut Von Ruschelschell, Law Reports of Trials of War Criminals*, Vol. IX (1949), p. 89.

<sup>37</sup> It is useful to consider the prohibition against the firing at helpless survivors of enemy vessels together with the duty of a belligerent to take all possible measures, consistent with the security of its own forces, to rescue the survivors of enemy vessels after an engagement (see paragraph 511b). The duty to rescue survivors is subject to the qualification of operational necessity. On the other hand, the prohibition against firing at helpless survivors is not so qualified and is absolute.

<sup>38</sup> Article 6 of Hague Convention No. XI (1907) states:

"The captain, officers, and members of the crew who are nationals of the enemy State, are not made prisoners of war, on condition that they undertake, on the faith of a formal written promise, not to engage, while hostilities last, in any service connected with the operations of the war."

However, the general practice of belligerents during World Wars I and II was to treat the officers and crews of all captured enemy merchant vessels as prisoners of war. Article 4, paragraph A (5) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War states that among those persons falling into the power of an enemy who are entitled to prisoner of war status are:

"Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the Conflict, who do not benefit by more favorable treatment under any other provisions of international law."

The "more favorable treatment" would appear to be a reference to Article 6 of Hague Convention No. XI (1907), quoted above, but since the present validity of Article 6 is doubtful, it can be assumed that the crews of captured merchant vessels (not merely "merchant marine" vessels) may be treated as prisoners of war.

<sup>39</sup> If necessary, enemy nationals found on board captured enemy merchant vessels may be treated as prisoners of war. Normally, however, enemy nationals who are merely private individuals are placed under detention and subjected to the discipline of the captor. Enemy nationals in the public service of an enemy state may be made prisoners of war.

<sup>40</sup> Article 5 of Hague Convention No. XI (1907) states:

"When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral state are not made prisoners of war. The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise formally in writing not to serve in an enemy ship while the war lasts."

<sup>41</sup> This paragraph is applicable as well to the officers and crews, nationals of a neutral state, of captured neutral merchant vessels and aircraft which have acquired enemy character and which are liable to the same treatment as enemy merchant vessels and aircraft, as described in paragraph 501b. Hence, a distinction must be made between the treatment accorded to neutral merchant vessels acquiring enemy character, and the treatment accorded to the personnel of such vessels. There is a clear exception, however, in the case of personnel of neutral vessels and aircraft which take a direct part in the hostilities on the side of an enemy or which serve in any way as a naval or military auxiliary for an enemy. (See paragraph 501a and Notes 6 and 31 above.)

<sup>42</sup> The removal of any of the categories of enemy nationals enumerated in this article may be exercised by a belligerent even though no sufficient reason exists for the capture of a neutral merchant vessel or aircraft.